

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

RALPH MURPHY and DONALD GALLAHER,

*Appellants,*

*vs.*

WARNER BROS. PICTURES, INC., a corporation,

*Appellee.*

---

OPENING BRIEF FOR APPELLANTS.

---

ROGER MARCHETTI and  
HAROLD A. FENDLER,  
1111 Pershing Square Building, Los Angeles,  
*Attorneys for Appellants,*

FILED

JUL 13 1931



TOPICAL INDEX.

	PAGE
Statement of Jurisdictional Facts.....	1
Statement of the Case.....	2
Basis of Appeal.....	6
Assignments of Error Relied Upon.....	7
Argument .....	9
Point I. The first ground stated by appellee in its motion for summary judgment is contrary to the undisputed fact that the contract dated April 30, 1928, between appellants and appellee's predecessor in interest did not "specifically" grant "talking" or "dialogue" rights in the play "Sh! The Octopus" .....	9
Assignments of Error IV to VIII, inclusive.....	9
Point II. The second ground of appellee's motion that the contract dated April 30, 1928, was interpreted by duly authorized agents of the parties, is predicated upon incompetent, self-serving and hearsay declarations made by a former agent of appellants eight months after his employment had terminated, which declarations are in no way binding upon appellants.....	14
Assignments of Error XVI and XVII.....	14

Point III. The remaining grounds of appellees' motion ignore appellants' pleading and proof of trade custom and trade usage which entered into and formed an integral and essential part of the contract dated April 30, 1928. Likewise ignored by appellants is the well settled law of New York state which admits evidence of trade custom and trade usage in order to ascertain the intention of the contracting parties as to the meaning of the peculiar trade terms used in the contract.....	19
Assignment of Error XIII.....	19
Point IV. In view of the genuine issues as to all material facts the summary judgment was improper.....	30
Assignments of Error IX, X, XI, XII, XIV, XVII, XVIII .....	30
Point V. In any event a summary judgment is improper in an action for infringement of copyright.....	38
Assignments of Error I and II.....	38
Conclusion .....	39

## TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Bighur v. Eclipse, 237 Fed. 89.....	34
Boorman & Johnston v. Jenkins, 12 Wend. N. Y. 573 (27 Am. Dec. 158) .....	20
Bourner v. United States, 26 Fed. Supp. 769 (E. D. N. Y.).....	39
Brown v. Byrne, 3 El. & Bl. 703, 118 Eng. Reprint 1304, Lord Coleridge .....	23
Caldwell v. Twin Falls etc. Co., 225 Fed. 584.....	34
Charles Blum Adv. Corp. v. L. & C. Mayers, 25 Fed. Supp. 934 .....	38
Christian v. First Natl. Bank, 155 Fed. 705.....	34
Curry v. McKenzie, 239 N. Y. 267.....	36
Cyborowsky v. Kinsman, 179 Fed. 440.....	18
Electric Reduction Co. v. Colonial Steel Co., 276 Pa. 181, 120 Atl. Reporter 116.....	24
Gillett v. Bank of America, 160 N. Y. 549.....	34
Goehring v. Stryker, 174 Fed. 897.....	18
Goetz v. Kansas City Bank, 119 U. S. 551.....	18
Kirk LaShelle v. Armstrong, 263 N. Y. 79.....	29
L. C. Page & Co. v. Fox Film Corp., 83 Fed. (2d) 196.....	29
Maryland Cas. Co. v. Sparks, 76 Fed. (2d) 929.....	37
Massee etc. v. Benenson, 23 Fed. (2d) 107.....	37
Miller v. Fischer, 142 App. Div. 172, 126 N. Y. Supp. 996.....	23
Moran v. Standard Oil Co., 211 N. Y. 187.....	34
Mutual Life Ins. Co. of N. Y. v. Patterson, 17 Fed. Supp. 416....	37
Newhall v. Appleton, 114 N. Y. 143, 21 N. E. 105, 3 L. R. A. 859 .....	20
Noonan v. Bradley, 9 Wall. 394.....	34
Norwich v. Barrett, 200 N. Y. S. 298.....	36
Norwood v. McCarthy (Mass.), 4 N. E. Rep. (2d) 450.....	37
Phoenix Ins. Co. v. Slaughter, 12 Wall. 404.....	34
Robinson v. United States, 13 Wall. 363.....	26

	PAGE
Schipper v. Milton, 51 App. Div. 522, 64 N. Y. Supp. 935 (affirmed 169 N. Y. 583, 62 N. E. 1100).....	21
Simon v. Etgen, 213 N. Y. 589.....	34
Taylor v. Bernheim, 58 Cal. App. 404.....	18
United States v. The Burdette, 9 Pet. 682.....	18
Van Zandt v. Hanover Natl. Bank, 149 Fed. 127.....	34
Vicksburg etc. R. Co. v. O'Brien, 119 U. S. 99.....	18
Walker v. Knox, 136 Fed. 334.....	18
Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407.....	19
Western Petroleum Co. v. Tidal Gasolene Co. (7th Cir.), 284 Fed. 82 .....	26

#### STATUTES.

Judicial Code, Sec. 128.....	1
Judicial Code, Sec. 129.....	1
Rules of Civil Procedure, Rule 56 (b).....	1, 6
Rules of Civil Procedure, Rule 56 (e) .....	17
17 United States Code, Sec. 34.....	1
17 United States Code, Sec. 35.....	1
17 United States Code, Sec. 36.....	1
17 United States Code, Sec. 38.....	1
28 United States Code, Sec. 41, (1) (c).....	1
28 United States Code, Sec. 225.....	1
28 United States Code, Sec. 227.....	1

#### TEXTBOOKS AND ENCYCLOPEDIAS.

22 American Bar Assn. Journal 881, at p. 884.....	37
89 American Law Reports 1228.....	27
22 Corpus Juris 379.....	17
3 Moore on Federal Practice, p. 3184.....	37
3 Williston on Contracts, Revised Ed., Sec. 661, p. 1902.....	25
3 Williston on Contracts, Revised Ed., Sec. 662, p. 1905.....	26
Wigmore on Evidence, 2463, pp. 3486, 3489.....	25

No. 9304.

In the United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

RALPH MURPHY and DONALD GALLAHER,  
*Appellants,*

*vs.*

WARNER BROS. PICTURES, INC., a corporation,  
*Appellee.*

---

OPENING BRIEF FOR APPELLANTS.

---

STATEMENT OF JURISDICTIONAL FACTS.

This is an appeal taken under sections 128 and 129 of the Judicial Code, 28 U. S. C., sections 225, 227, and 17 U. S. C., section 38, from a summary judgment entered in the District Court of the United States for the Southern District of California, Central Division, on August 5, 1939.

The District Court had jurisdiction of the matter by reason of alleged infringement of copyright under 17 U. S. C., sections 34-36, inclusive, and by reason of diversity of citizenship, 28 U. S. C., section 41 (1) (c).

The summary judgment was granted upon defendant-appellee's motion under Rule 56 (b) of the Rules of Civil Procedure.



## STATEMENT OF THE CASE.

Appellants Ralph Murphy and Donald Gallaher are authors and copyright proprietors of an unpublished dramatic composition copyrighted December 9, 1927, under the title of "The Nightmare" and plaintiffs allege in their first cause of action for infringement of copyright by appellee that ever since said date of copyright appellants have owned such copyright and all dramatic rights, talking rights and dialogue rights in and to said composition. [Tr. pp. 3-5.]

Appellants allege in their second cause of action that prior to the 14th day of February, 1928, they composed and created a certain dramatic composition originally entitled "The Nightmare" but subsequently retitled "Sh! The Octopus," which composition was successfully produced as a play upon the New York stage by the plaintiffs and their producing manager; and that on April 30, 1928, appellants entered into a written contract [Tr. pp. 5-7] with First National Pictures, Inc. (the predecessor in interest of the appellee Warner Bros. Pictures, Inc.) by the terms of which appellants sold to appellee "the exclusive, complete and entire motion picture rights" in and to the dramatic composition in question together with "the exclusive right to make motion picture versions thereof . . . and the exclusive right to use in conjunction with said motion picture versions such *devices for the recording and/or reproduction of sounds* as may from time to time be utilized as a part of the presentation and exhibition of the photoplays *together with the right to utilize any music or orchestration*, score or numbers in connection with said pictures as may be desired." [Tr. pp. 13-14.]



The foregoing contract was entered into during the transitional period between “silent” motion pictures and “talking” motion pictures. The appellants alleged in their complaint that at the time said agreement was entered into [Tr. pp. 7-9, par. IV] “there were in existence and generally known to and throughout the motion picture trade and industry three distinct separate sets and classifications of literary and dramatic rights which were at said time and place the subject of barter, purchase and sale throughout said trade and industry, as follows, to-wit:

(1) “*Motion picture rights*”, to-wit: The right to use literary or dramatic compositions in motion pictures.

(2) “*Sound rights*”, to-wit: The right to utilize sound effects in conjunction with the use of literary or dramatic compositions in motion pictures.

(3) “*Dialogue rights*” and “*talking rights*”, to-wit: The right to use speech and dialogue in connection with literary or dramatic compositions produced in the form of “talking” motion pictures.

Appellants furthermore expressly alleged that on the day said contract was entered into with appellee’s predecessor in interest there was [Tr. pp. 7-8, Complaint, para. IV]:

“a general, uniform, well-recognized, trade custom and trade usage in the motion picture industry to purchase and/or sell the particular class or classification of motion picture rights so desired to be purchased or sold and in said motion picture trade and industry at said time and place there was a general trade usage and custom that . . . the sale, license or grant of ‘motion picture rights’ together with right to use ‘sound’ in conjunction therewith did *not* include ‘dialogue’ and ‘talking rights’, unless expressly pro-

vided, enumerated and granted at the time of sale and said general trade usage and custom were at said time and place well known throughout the motion picture industry.”

Appellants furthermore expressly alleged [Tr. pp. 8-9, Complaint, para. IV] that:

“Said agreement hereinabove referred to was made and entered into by each of the parties thereto with full knowledge of said trade customs and trade usages and with the intention that the same should apply to said agreement; and none of the parties hereto intended in and by said agreement aforesaid that ‘dialogue’ or ‘talking’ rights should be or were included in the grant, license and sale more particularly referred to in said agreement.”

Appellee moved for summary judgment upon the primary ground that “both ‘talking’ and ‘picture’ rights” had been conveyed by appellants and that the contract of conveyance

“*specifically* grants . . . the right . . . to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version and the right to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on the screen.” [Tr. pp. 62 and 63, paragraphs I and II.]

Submitted in support of appellant’s motion were two affidavits, to-wit, R. W. Perkins [Tr. p. 12], and Nathan Levinson. [Tr. p. 75.]

Appellants opposed the motion with four affidavits consisting of the joint affidavit of Ralph Murphy and Donald Gallaher [Tr. p. 25], supplemental affidavit of Donald Gallaher [Tr. p. 30]; supplemental affidavit of Ralph Murphy [Tr. p. 35]; and a supplemental affidavit of Harold A. Fendler. [Tr. p. 77.]

The respective affidavits submitted by appellants and appellee are conflicting in almost every respect; but are particularly conflicting upon the vital express averments in the complaint (1) as to the existence of the trade custom and trade usage, (2) as to the knowledge of the contracting parties as to the existence of such trade custom and trade usage, and (3) the mutual intentions of the contracting parties to enter into their contract with reference to such trade custom and trade usage.

Likewise the affidavits are strongly conflicting upon the distinctions claimed by appellants to have been known and in common usage in the theatrical business in the year 1928 in New York City by which "motion picture" rights were then and there distinguished from so-called "sound rights" and "sound rights" were distinguished from so-called "talking" "dialogue" or "dramatic" rights.

In the court below appellee contended that there was no genuine issue as to any material fact, despite the pleadings and conflicting affidavits; and that appellee was entitled to summary judgment as a matter of law.

## BASIS OF APPEAL.

Where there is sharply conflicting evidence upon vital issues of fact pleaded and controverted by the respective parties, appellants contend that the case is not a proper one to be disposed of under Rule 56 (b) of the Code of Civil Procedure and that a summary judgment is improper. This is particularly true of an action for infringement of copyright.

Another point is whether or not upon motion for summary judgment appellants can be bound by affidavits containing declarations made by a former agent eight months after such agent's employment had been terminated and for which declarations appellants claimed there was no precedent authority or subsequent ratification.

The final question for determination by this court is whether or not the allegations of trade custom and trade usage pleaded in the complaint and abundantly supported by affidavits submitted in opposition to the motion for summary judgment, did not preclude the trial court from trying the case upon the conflicting affidavits and rendering its decision thereon.

## ASSIGNMENTS OF ERROR RELIED UPON.

Assignments of Error IV to VIII are relied upon in support of our first point that the contract dated April 30, 1928, does not “specifically grant” “talking rights” nor the right “to record spoken words and dialogue in synchronism or timed relation with the photographing of any motion picture version” or the “right to reproduce and make audible spoken words and dialogue in synchronism or timed relation with the projection on screens” nor the right to “publicly perform and reproduce motion picture versions . . . by means of motion picture and spoken words and dialogue recorded and reproduced in synchronism or timed relation therewith” [appellant’s motion for summary judgment, ground numbered “I”, Tr. p. 62].

Assignments of Error numbers XVI and XVII are relied upon under the second point of our argument that declarations by a former agent eight months after his employment has terminated are not competent evidence against his former employer in the absence of precedent authority or subsequent ratification. [Appellant’s motion for summary judgment, ground numbered “II”, Tr. p. 63].

Assignment of Error XIII is relied upon in support of our third point that construction of the contract dated April 30, 1928, in view of the pleading as to trade custom and trade usage, required consideration of evidence relating to technical trade terms used in the theatrical business and carried into the contract in question by the parties with the express intention that the peculiar trade meaning should apply to the trade terms so used.

Assignments of Error IX, X, XI, XII, XIV, XVII and XVIII, inclusive, are relied upon under the next point in our argument that conflicting affidavits upon vital issues of fact negative appellee's contention in the trial court that "there was no genuine issue as to any material fact." [Tr. p. 63.]

Assignments of Error numbered I and II are relied upon in support of our final point that a motion for summary judgment is improper where infringement of copyright is pleaded in good faith and non-infringement is pleaded as a defense.



## ARGUMENT.

### POINT I.

The First Ground Stated by Appellee in Its Motion for Summary Judgment Is Contrary to the Undisputed Fact That the Contract Dated April 30, 1928, Between Appellants and Appellee's Predecessor in Interest Did Not "Specifically" Grant "Talking" or "Dialogue" Rights in the Play "Sh! The Octopus."

ASSIGNMENTS OF ERROR IV TO VIII INCLUSIVE.

#### IV.

"The Court erred in determining that First National Pictures, Inc., a corporation, on April 30, 1928, acquired from these appellants the talking motion picture rights in and to that certain literary material entitled 'Sh! The Octopus.'"

#### V.

"The Court erred in determining that Warner Bros. Pictures, Inc., a corporation, was or is the owner of the talking motion picture rights in and to that certain literary material entitled 'Sh! The Octopus.'"

#### VI.

"That paragraph numbered II contained in said summary judgment reading as follows:

'(2) That First National Pictures, Inc., a corporation, on April 30, 1928, acquired from Ralph Murphy, Donald Gallaher and The M. & G. Amusements, Inc., a New York corporation, under the terms of the written agreement hereinabove referred to, the exclusive,



complete and entire silent and talking motion picture rights in and to that certain literary material entitled "Sh! The Octopus",'

is not supported by the evidence and is contrary to and against law."

#### VII.

"That paragraph numbered III contained in said summary judgment reading as follows:

'(3) That Warner Bros. Pictures, Inc., a corporation, is the owner of the exclusive, complete and entire silent and talking motion picture rights in and to that certain literary material referred to in paragraph 2 hereof and entitled "Sh! The Octopus",'

is not supported by the evidence and is contrary to and against law."

#### VIII.

"That said summary judgment is contrary to the evidence and contrary to law in holding that on April 30, 1928, appellants and the M. & G. Amusements, Inc., a New York corporation, as owners and First National Pictures, Inc., a corporation, as purchaser, entered into a written agreement for the sale and purchase of the exclusive, complete and entire silent and talking motion picture rights in that certain literary material entitled 'Sh! The Octopus', a copy of said agreement being attached to appellants' amended complaint, marked Exhibit '1'."

The second cause of action contained in the amended complaint alleged that the appellants sold to appellee's predecessor in interest the motion picture rights in the play entitled "Sh! The Octopus," together with the right to utilize music, orchestration or other sound effects but that

appellants have at all times retained the so-called "talking" rights or "dialogue" rights in their play. [Amended Complaint, pars. III and IV, Tr. pp. 6 and 7.]

The answer alleged that by the contract dated April 30, 1928, appellants had granted (1) "the right to make talking motion picture versions of the literary material," and the right (2) "to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version" and (3) "the right to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on screens," and (4) the right "to publicly perform and reproduce motion picture versions and dramatization of said literary material by means of motion picture *and spoken words and dialogue* recorded and reproduced in synchronism or timed relation therewith by mechanical or electrical means." [Answer, par. VI, Tr. pp. 44-45.]

The first ground stated in the motion for summary judgment was that the contract dated April 30, 1928:

*"by its terms specifically grants on the part of the plaintiffs, the right to make motion picture versions of the literary material, the subject of said contract, and any version or dramatization thereof and to record spoken words and dialogue in synchronism or timed relation with the photographing of any such motion picture version and the right to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on screens and to publicly perform and reproduce motion picture versions and dramatizations of said literary material by means of motion picture and spoken words and dialogue recorded and reproduced in*

synchronism or timed relation therewith by mechanical or electrical means, contrary to the claim of the plaintiffs as in their amended complaint and prayer set forth.”

Reference to the contract [Tr. pp. 12 to 20, incl.] shows that there is no such specific grant contained in such contract nor any language remotely resembling the language used in appellee’s answer or its motion for summary judgment.

The contract commences with a representation that appellants are the owners of the “motion picture rights.” [Tr. p. 13.] The next recital is that appellee’s predecessor in interest desires to acquire the “motion picture rights.” [Tr. p. 13.] The contract does generally grant to the appellee “the exclusive complete and entire motion picture rights” and “the exclusive right to make motion picture versions” of the unpublished and uncopyrighted play entitled “Sh! The Octopus” [Tr. p. 13]; but *the specific grant* is as follows: “and the exclusive right to use in conjunction with said motion picture version such devices for the recording and/or reproduction of *sounds* as may from time to time be utilized as a part of the presentation and exhibition of the photoplays, together with the right to utilize any music or orchestration, score or numbers in connection with said pictures as may be desired.” [Tr. p. 14.]

Specific use of terms such as “spoken words,” “dialogue” or “talking” rights, are conspicuous by their absence.

In view of the patent omission of such terms we are unable to find any justification whatsoever for the phrase-

ology contained in appellee's answer and their motion for summary judgment that the contract in question "by its terms *specifically grants* . . . the right to reproduce and make audible the said spoken words and dialogue," etc. [Tr. p. 62.]

That there is no specific grant, as alleged by appellees, is also shown by the fact that eight months after the contract was entered into and in December of 1928 appellee's predecessor in interest found it necessary to contact appellants' former agent for the purpose of having such agent give them a written memorandum (without the knowledge of appellants) that the contract "covered" the "talking" rights. [Exhibits B, C, and D attached to the answer, Tr. pp. 60-61, and submitted in support of the motion for summary judgment, Tr. pp. 24-25.]

We shall contend hereinafter (Point II, *post* pp. 14-18) that such written declaration by a former agent eight months after his employment had terminated, are wholly incompetent evidence against appellants. At this time we merely point out the fact reflected by the affidavits in opposition to motion for summary judgment [Affidavit of Ralph Murphy, Tr. pp. 40-42] that appellee's predecessor in interest purchased the motion picture rights in April of 1928 for the purpose of producing immediately a motion picture "with sound effects added." During the course of the next eight months, however, "talking" motion picture photoplays became popular and the contract made with appellants did not cover "talking" rights. Appellee's attempt to secure "coverage" from appellants' former agent eight months after the contract was signed *without* talking rights, therefore becomes doubly significant.

POINT II.

The Second Ground of Appellee's Motion That the Contract Dated April 30, 1928, Was Interpreted by Duly Authorized Agents of the Parties, Is Predicated Upon Incompetent, Self-Serving and Hearsay Declarations Made by a Former Agent of Appellants Eight Months After His Employment Had Terminated, Which Declarations Are in No Way Binding Upon Appellants.

ASSIGNMENTS OF ERROR XVI AND XVII.

XVI.

"That the trial court erred in holding and determining that declarations by a former agent after his employment terminated are competent evidence against his former employer."

XVII.

"That the trial court contrary to law substituted a trial by affidavits in place and stead of a trial upon legal evidence and abused its discretion in granting said motion for summary judgment."

Appellee produced in support of its motion for summary judgment an affidavit of R. W. Perkins, secretary of First National Pictures, Inc., to which affidavit was annexed a letter dated Dec. 11, 1928 [Exhibit B, Tr. p. 27], commencing "Dear Bob": signed "Larry" reading as follows:

"It was my understanding that the phraseology in the contract for 'Sh! The Octopus,' covered, as it was certainly intended to do, the so-called talking, as well as the motion picture rights.



The negotiations for the purchase were conducted upon the basis of both the picture and the talking rights, and I am sure that no one connected with the sale would think of contending otherwise.”

Attached to this letter is Exhibit C [Tr. p. 24] reading as follows:

“Dear Bob: If this is not the *coverage you require* let me know, and I’ll change, abridge or amplify it in any way you suggest.”

Exhibit D [Tr. p. 25] is a letter addressed to “Dear Larry” reading as follows:

“Thank you for your letter of December 11th, 1928, which confirms the language of the contract, which I already think is entirely clear, that the talking motion picture rights are covered in our contract for ‘Sh, The Octopus.’

With best wishes, I am

Sincerely yours,

R. W. PERKINS.”

If the contract was clear on its face in specifically granting “dialogue” and “talking” rights it is obvious there would have been no reason for the interchange of letters quoted above eight months after the contract was executed.

It is self-evident from Exhibit C that appellee’s predecessor in interest was demanding “coverage” on “talking” rights and appellants’ former agent was willing to furnish such coverage “in any way suggested” by appellee’s prede-

cessor. [Tr. p. 24.] It is noteworthy that each of these exhibits distinguishes between “talking” rights and “motion picture” rights. And yet the contract in question made no mention whatsoever of either “talking” or “dialogue” rights.

Appellee produced no authority whatsoever from appellants to R. L. (Larry) Giffen to grant the “coverage” referred to. There is no suggestion in appellee’s moving papers of any knowledge whatsoever brought home to appellants concerning the requested “coverage.”

Under the circumstances there is no precedent authority nor subsequent ratification and each of the appellants expressly denies any knowledge or authority whatsoever to the former agent to grant the “coverage” in question; and each of the appellants furthermore expressly denies that negotiations were ever conducted upon the basis of “talking rights” [Affidavit of Ralph Murphy and Donald Gallaher, Tr. p. 26]; appellants stating in the most unqualified language:

“That Mr. R. L. Giffin was not connected with the plaintiffs or either of them and was not authorized to act as an agent or otherwise on behalf of the plaintiffs or either of them on the 11th day of December, 1928, or at any time subsequent to the 30th day of April, 1928. That neither of affiants were notified or informed or had any knowledge of the documents attached to said motion for summary judgment and to said affidavits respectively designated Exhibits ‘B’, ‘C’ and ‘D’, and each and all of the statements made in Exhibit ‘B’ with respect to negotiations for the purchase of the motion picture rights of ‘Sh! The Octopus,’ and with respect to the intention of the contracting parties are wholly untrue.



Neither of your affiants was ever asked to convey nor quoted a price for the purchase of dialogue or talking motion picture rights and at no time were affiants or either of them asked to convey nor did they intend to convey the dialogue or talking motion picture rights nor the right to record spoken words and dialogue in synchronism or timed relation to the photographing of any motion picture version of said play entitled 'Sh! The Octopus.'" [Tr. p. 26.]

Even assuming a conflict could be said to exist between appellants' affidavits on the one hand and the unsworn correspondence with appellants' ex-agent on the other, it would certainly be impossible for any court to determine the conflict without fully hearing the evidence on both sides and determining the credibility to be attached to the testimony given under oath and subject to cross-examination.

In no event, however, does the affidavit of R. L. Perkins nor Exhibits B, C and D attached thereto set forth facts admissible in evidence from persons competent to testify thereto under the express requirement of Rule 56 (e) of the Rules of Civil Procedure. The correspondence in question is purely hearsay as to appellants who disclaim any knowledge of it whatsoever.

In any event written declarations of a former employee are in no way binding upon his former employers. The general rule is stated in *22 Corpus Juris*. 379:

"It is well established that admissions made by an agent in a narrative statement of a past transaction cannot be received in evidence against his principal." (Citing innumerable cases.)

“(380) . . . It is no part of an agent’s duty to prejudice his principal by narrative statements construing or otherwise affecting his principal’s rights or liabilities.” (Citing cases.)

“(381) . . . An admission made before the declarant was employed as the agent of the party against whom it is sought to be used or after such employment had terminated, cannot be received.” (Citing cases.)

In *Taylor v. Bernheim*, 58 Cal. App. 404, at 409, the California court states the general rule as follows:

“Declarations of an agent, with respect to a transaction, made after the completion of the transaction, are not provable against the principal. Such statements are merely hearsay, and, like those of any other person, cannot affect the principal. (1 Ruling Case Law, p. 510.) In this respect it is said, ‘A rule that would allow an agent, after a transaction is closed, to admit away the rights of principal, would be too dangerous to be tolerated.’”

The rule has been followed in the Federal courts in a number of cases, among which are the following:

*Vicksburg etc. R. Co. v. O’Brien*, 119 U. S. 99;

*Goetz v. Kansas City Bank*, 119 U. S. 551;

*U. S. v. The Burdette*, 9 Pet. 682;

*Cyborowsky v. Kinsman*, 179 Fed. 440;

*Goehrig v. Stryker*, 174 Fed. 897;

*Walker v. Knox*, 136 Fed. 334.

### POINT III.

The Remaining Grounds of Appellees' Motion Ignore Appellants' Pleading and Proof of Trade Custom and Trade Usage Which Entered Into and Formed an Integral and Essential Part of the Contract Dated April 30, 1928. Likewise Ignored by Appellants Is the Well Settled Law of New York State Which Admits Evidence of Trade Custom and Trade Usage in Order to Ascertain the Intention of the Contracting Parties as to the Meaning of the Peculiar Trade Terms Used in the Contract.

#### ASSIGNMENT OF ERROR XIII.

“That the contract dated April 30, 1928, is governed by the laws and decisions of the State of New York and the law of the State of New York is contrary to the construction and interpretation given by the trial court to the said contract.”

The contract was made in the State of New York and expressly provides that it shall be construed “in accordance with the laws of the United States of America and of the State of New York.” [Par. X, Tr. p. 19.]

The overwhelming weight of authority in the State of New York supports the introduction of evidence to establish trade custom and trade usage where the same are properly pleaded as essential and integral portions of a contract and in order to explain and define peculiar trade terms used therein (although outside of the particular trade or industry such terms might convey a very different meaning or definition).

In *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, the plaintiffs claimed that in determining the number of square yards of plastering defendant's house, that the openings,

including the doors and windows, were to be measured as plastering, and that, in rooms plastered with two or three coat work, the part of the work behind the cornice and baseboard was to be measured as though actually plastered with two or three coats, though the same was only plastered with one coat. This claim was based on the assumption that at the time the agreement was made it was the custom of plasterers to so charge. Judge Folger said:

“Every legal contract is to be interpreted in accordance with the intention of the parties making it.  
\* \* \* Parties are held to contract in reference to the law of the state in which they reside.  
\* \* \* And so they are presumed to contract in reference to the usage of the particular place or trade in or as to which they enter into agreement,  
\* \* \* when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. \* \* \*  
Evidence of usage is received, as is any other parol evidence, when a written contract is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons, as to particular subjects, to give effect to language in a contract as it was understood by those who made use of it.” (Citing: *Boorman & Johnston v. Jenkins*, 12 Wend. N. Y. 573 (27 Am. Dec. 158).)

In *Newhall v. Appleton*, 114 N. Y. 143, 21 N. E. 105, 3 L. R. A. 859, the defendants offered to show that in the subscription book business the words used in the contract had a definite and well-established meaning, and that meaning was as set forth in the answer; that the words

“\$15 an order for each and every order obtained for the encyclopedia” meant, and were well understood in the subscription book business to mean, \$15 an order for each and every order obtained for the encyclopedia under which five volumes have been taken and paid for by the subscriber, and not otherwise, while “\$4 an order for the other publications” meant “\$4 for an order under which ten parts each, respectively, had been taken and paid for by the subscriber, and not otherwise”. The New York Court of Appeals unanimously held:

“Evidence is always admissible to explain the meaning which usage has given to words or terms as used in any particular trade or business, as a means of enabling the court to declare what the language of the contract did actually express to the parties \* \* \* The principle stated in authorities cited authorized the introduction of evidence, on the part of the defendants, tending to show that, by the usage or custom of the subscription book business, the words used in the contract had a well-defined meaning, which was understood by both parties to the contract, and what such meaning was. The evidence of custom was admissible, not to change or vary the contract made, but to ascertain with greater certainty what was the intention of the parties at the time of its making.”

In *Schipper v. Milton*, 51 App. Div. 522, 64 N. Y. Supp. 935 (affirmed 169 N. Y. 583, 62 N. E. 1100), plaintiff claimed that there has arisen among dealers in hemp a well established custom by which the quality specified in the contract is regarded simply as a measure of the value of the hemp to be sold, and that whenever a cargo arrives, if the parties to the contract cannot agree upon the valua-



tion, it is the custom to refer it to arbitrators, who shall inspect the hemp, and fix the allowance to be made to the purchaser for the inferior hemp, and that upon such arbitration the price to be paid is to be established and the rights of the parties depend. The defendants claimed that the evidence established no such custom, and that, if it did, the custom is unreasonable, unnecessary, and contradicts the contract, and that for these reasons the rights of the parties cannot be affected by it. Says Rumsey, J.:

“\* \* \* But it is said that this custom is unreasonable, because it requires a party to accept goods of a different quality from that which he purchased.

\* \* \* But it is said in addition that this custom tends to contradict the express terms of the contract.

\* \* \* Mercantile contracts are not always to be strictly construed. The intention of the parties is to be sought, and that intention would not infrequently be defeated if the words were to be construed according to their usual import, and for that reason evidence is admitted to expound them and to arrive at the true meaning of the contract. When a custom has been proved to exist, the mere fact that it apparently varies the contract is not sufficient to exclude proof of the custom, because it is impossible, without changing to some extent its apparent effect, to add a material incident by showing that the words are not employed in their usual meaning. *Brown v. Byrne*, 3 El. & Bl. 703, 715. So that unless as the result of the parol evidence the custom established is contradictory to the express terms of the contract, it must be received for the purpose of explaining it, to enable the court to decide as to the rights of the parties as affected by the custom, of which they were aware when the contract was made, and which entered into their agreement.”

In *Brown v. Byrne* (1854), 3 El. & Bl. 703, 118 Eng. Reprint, 1304, Lord Coleridge, discussing the question under consideration, said:

“Neither, in the construction of a contract among merchants, trademan, or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than ‘a thousand’, ‘a week’, ‘a day’? Yet the cases are familiar in which ‘a thousand’ has been held to mean twelve hundred, ‘a week’ a week only during the theatrical season, ‘a day’ a working day. In such cases the evidence neither adds to, nor qualifies nor contradicts, the written contract; it only ascertains it, by expounding the language. Here the contract is, to pay freight on delivery at a certain rate per pound; is it inconsistent with this to allege that, by the custom, the shipowner, on payment, is bound to allow three months’ discount? We think not.”

In *Miller v. Fischer*, 142 App. Div. 172, 126 N. Y. Supp. 996, plaintiff brought an action upon a contract for the hiring of a canal boat for the transportation of ice. The defendant’s contention at the trial was that there was a custom among boatmen and ice dealers, known to plaintiff, to the effect that boats engaged in the transporting of ice should not be paid for unless ice should form of sufficient thickness to be marketable. The trial court ruled that the contract was specific and that proof of custom was immaterial. Mr. Justice Houghton, writing the unanimous opinion of the court, said:

“We are of the opinion this was error. Assuming that the telegrams and writings which passed be-



tween the parties constituted a binding written contract, still the terms are not so specific that it can be said as matter of law that it was not made with reference to a well-known and uniform custom of the business.”

Although not arising in New York state, authorities from that jurisdiction are cited in support of the decision in *Electric Reduction Co. v. Colonial Steel Co.*, 276 Pa. 181; 120 Atlantic Reporter 116. The contract there provided that the tungsten powder purchased by the defendant was to be “free from copper, tin, and all other impurities.” Evidence was offered that there was a well settled usage which limited the term “free” used in the contract so as to mean “commercially free”. The Supreme Court of Pennsylvania held as follows, at page 118:

“While words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary and popular meaning, yet, if, in reference to the subject matter of the contract, particular words and expressions have by usage acquired a meaning different from their plain, ordinary and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense and that sense may be fixed by parol evidence. The evidence is not incompetent because the words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the parties in a different sense.’ (17 *Corpus Juris* 498, and note).

*“The admission of evidence of a custom is not dependent on the rule that parol evidence is inadmissible to vary a writing, nor inconsistent therewith, but upon the ground that the law makes the custom a*

part of the contract. (*Branch v. Palmer*, 65 Ga. 210.)

\* \* \* \* \*

“The liberal rule, on the other hand, is today conceded, practically everywhere, to permit resort in any case to the usage of a trade or locality, no matter how plain the apparent sense of the word to the ordinary reader; and some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words and the injustice of attempting to enforce a supposed rigid standard. \* \* \* Where all the parties are members of the same trade, \* \* \* little difficulty can arise; the only requirement is that the special sense alleged should be in fact a usage, or settled habit of expression of a few persons or of casual occasions.” (*Wigmore on Evidence*, 2463, pp. 3486, 3489.)

At page 119:

“While it was denied by witness called in behalf of defendant that such a custom existed or was known to them, we think under the evidence produced it was for the jury to say whether the custom existed and they have found it did. *‘The existence of a usage or custom is generally regarded as a question of fact for the determination of the jury when the evidence is conflicting.’* (27 Ruling Case Law, p. 196.)”

3 *Williston, on Contracts*, Revised Edition, section 661, states the general rule supported by citation of New York cases, as follows at page 1902:

“A person entering into a contract in the ordinary course of business is presumed to have done so in reference to any existing general usage or custom relating to such business and this is so whether he knew of the custom or not.”

At page 1903:

“If it can be proved that the parties in fact knew of the usage, it is immaterial for how brief a time it existed.”

At page 1905, section 662:

“Whether a usage exists is a question of fact though the evidence of it may be insufficient to warrant submission to the jury. Whether the facts are such that the parties must be assumed to have adopted the usage because of actual knowledge or duty to know is also a question of fact. On the other hand, the validity of the usage and its effect if any, upon the contract of the parties is a question of law.”

In *Robinson v. U. S.* 13 Wall. 363, the contract was to deliver “first quality, clear barley,” the court stating at page 366:

“Parties who contract on a subject matter concerning which known usages prevail, by implication incorporate that into their agreement, if nothing is said to the contrary. The evidence in the present case did not tend to contradict the contract but to define its meaning in an important point where, by its written terms, was left undefined. This, it is settled, may be done.”

In *Western Petroleum Co. v. Tidal Gasolene Co.* (7th Cir.), 284, Fed. 82, at p. 84, the contract provided for purchase of gasolene at “tank wagon price f.o.b. point of delivery.” Evidence was offered to show that “in addition to the different price at which gasolene was actually sold from tank wagons in Chicago, there existed another distinct price which was announced to the trade in general; that it was upon this “so-called announced price” that

contracts in the oil trade were based and that the phrase “tank wagon price” referred to this “announced price” rather than to the price at which oil was actually sold from tank wagons in Chicago. The court held that there was sufficient evidence of the existence of the alleged trade usage to require its submission to the jury and that such evidence was competent; the court stating at page 84:

*“Its existence is a matter of fact, to be proved as any other matter of fact.”*

In 89 *A. L. R.* 1228, under an annotation entitled: “Admissibility of Extrinsic Evidence of Custom or Usage to Show That Words Employed in a Contract Unambiguous on Their Face Have a Special Trade Significance,” it is said at page 1229:

“It is further noted that where there is a well-known usage which obtains in a trade or business, it must be presumed that all who are engaged in that trade or business where it prevails contract with a view to such usage, unless they exclude the presumption by their contract. (27 *R. C. L.* 162.)

“Notwithstanding the parol evidence rule, parol evidence is always receivable to define and explain the meaning of words in a contract which are technical, or which have two meanings—the one common and universal, and the other technical; permitting oral evidence in cases of this kind is not allowing it for the purpose of varying or altering the contract or putting a different sense or construction upon its language from that which it would ordinarily bear, but is allowing it for the purpose of showing what was the real intention in using such language. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language

of trade into the ordinary language of the people generally. (10 R. C. L. 1072.)

“Such a technical or trade meaning is usually proved by evidence of trade custom or usage. (See 27 R. C. L. 170.)”

We have quoted from the foregoing authorities (which are all supported by decisions of the state of New York) for the reason that we desire to show that the principle of law for which we contend is neither naive, unusual, nor is it confined to the territorial limits of the state of New York.

Appellee, however, contended as its sixth ground in support of its motion for summary judgment as follows [Tr. p. 63]:

“That as a matter of law the terms and provisions of the contract (Exhibit A) have been judicially interpreted by the laws of the State of New York as conveying the talking as well as the silent motion picture rights—principally the case of *L. C. Page & Co. v. Fox Film Corp.* (1936), 83 F. (2d) 196.”

As is the case with other of appellee's grounds (noticeably ground I, see Point I, *supra*, pp. 9-13), the fact is exactly contrary to what is stated by appellee.

In the first place such a contract as that dated April 30, 1928, has never been judicially interpreted by any court either in the state of New York or elsewhere.

In the second place trade custom and trade usage have never been pleaded or proven in connection with any motion picture contract of any kind or character either in the



state of New York or elsewhere—and under New York law trade custom and trade usage become an integral part of any contract containing trade terms.

Specifically with respect to the case of *L. C. Page & Co. v. Fox Film Corp.*, 83 F. (2d) 196, it should be observed that such case, although decided by the Second Circuit Court of Appeals, was not a case in which the contract was executed in the state of New York or governed by the laws or decisions of the state of New York. On the contrary, the contract in the *Page* case was between a Massachusetts corporation (*L. C. Page & Co., Inc.*, the plaintiff), and Laura E. Richards, a citizen of the state of Maine.

Reference to the record on appeal in that case shows that the court placed the same construction upon that contract which had been placed thereon by the parties themselves shortly prior to the commencement of the action. Furthermore the *Page* case expressly states that the decision of the New York Court of Appeals in *Kirk LaShelle v. Armstrong*, 263 N. Y. 79, “seems opposed to the view we have expressed.” (83 F. (2d) at p. 199.)

Where the court in the *Page* case expressly states that the latest decision of the court of last resort in New York state seems “opposed” to the decision in the *Page* case, we are utterly at a loss to understand how appellee can contend that the *Page* case establishes the law of New York. If for no other reason than the fact that trade custom and trade usage were not pleaded and did not enter into the decision in the *Page* case, we submit it is completely distinguishable from the case at bar.

POINT IV.

In View of the Genuine Issues as to All Material Facts  
the Summary Judgment Was Improper.

ASSIGNMENTS OF ERROR IX, X, XI, XII, XIV,  
XVII, XVIII.

IX.

“That the court erred as a matter of law in holding that there was no genuine issue as to any material fact alleged in appellants’ amended complaint.”

X.

“That the court erred as a matter of law in holding that the appellee was entitled to judgment as a matter of law.”

XI.

“That the court erred as a matter of law in finding that the merits of said motion for summary judgment were with the appellee.”

XII.

“That the court erred as a matter of law in holding that the appellee was entitled to a summary judgment against appellants upon the pleadings and other matters appearing of record.”

XIV.

“That the allegations contained in the amended complaint relating to well settled trade custom and usage known to the contracting parties and intended by them to apply to their contract dated April 30, 1928, by and between appellants and the M. & G. Amusements, Inc., a corporation, as owners, and First National Pictures, Inc., a corporation, as purchaser, were not conclusions of law but allegations of fact



to be proved upon the trial and which were intended to and did become an integral and essential part of said contract.”

XVII.

“That the trial court contrary to law substituted a trial by affidavits in place and stead of a trial upon legal evidence and abused its discretion in granting said motion for summary judgment.”

XVIII.

“That the trial court erred as a matter of law and abused its discretion in disregarding substantial conflict in affidavits submitted upon substantial issues raised by the pleadings and in holding that such controverted facts and issues might be determined without hearing evidence and without trial.”

Grounds numbered III, IV and V in appellee’s motion for summary judgment [Tr. p. 63] are in substance that there is no genuine issue as to any material facts because the contract dated April 30, 1928, shows upon its face that appellants are not entitled to relief.

If it were true that the contract in question “specifically” granted “talking” and “dialogue” rights as contended by appellants in ground “I” of their motion for summary judgment, we would concede as to the second cause of action that there was no genuine issue; but the contrary is true. The contract does not so read.

As we have heretofore pointed out (Point I, *supra*, pp. 9-13) the contract dated April 30, 1928 [Tr. pp. 13-21] does *not* specifically grant (1) the right to “record spoken words and dialogue” nor (2) the right “to reproduce and make audible the said spoken words and dialogue in synchronism or timed relation with the projection on

screens," nor (3) the right "to publicly perform and reproduce . . . dramatizations of said literary material by means of . . . spoken words and dialogue."

These rights were not made the subject of the contract because they were not important to appellee's predecessor in interest in April of 1928, at which time First National Pictures intended to produce the play "as a silent picture or with mere sound effects." [Affidavit of Donald Gallaher, Tr. p. 35.]

As stated in Ralph Murphy's affidavit [Tr. p. 41]:

"Affiant knows of his own personal knowledge that First National Pictures Inc. purchased the motion picture rights of 'Sh! The Octopus' for the purpose of making a motion picture photoplay with sound effects which would be a 'follow-up' or 'sequel' to the prior mystery photoplay entitled 'The Gorilla' which had been written at least in part by affiant's co-plaintiff, Donald Gallaher and the *silent* picture rights of which were purchased for a sum in excess of the \$10,000 paid by First National Pictures, Inc. for the motion picture rights of 'Sh! The Octopus.'

Affiant can testify from his personal knowledge that First National Pictures, Inc. intended to and through their agents suggested to affiant that it intended to produce 'Sh! The Octopus' as a silent motion picture photoplay with sound effects added immediately after the agreement dated April 30, 1928, was executed, but for reasons unknown to affiant First National Pictures, Inc. did not at any time produce said motion picture photoplay.

Affiant is informed and believes and thereupon alleges that the reason that First National Pictures, Inc. did not produce 'Sh! The Octopus' was because of the fact that within a short time after April, 1928,

talking motion pictures became acceptable to the general public and to the theatrical and moving picture industry generally and First National Pictures, Inc. had not acquired and did not own the dialogue rights, or talking picture rights to said motion picture photograph." [Tr. p. 41.]

By December of 1928, however, appellee recognized the necessity of acquiring "dialogue" or "talking" rights and approached appellant's former agent R. L. Giffen for the purpose of securing "coverage" upon the "so-called talking, as well as the motion picture rights." [Exhibits B, C, D, Tr. pp. 24-25.]

The very distinction between "talking" rights and "motion picture rights" repeatedly stated and appearing throughout the correspondence between R. W. Perkins, appellee's executive officer, and the agent who negotiated the sale, is most significant.

There was a standard form of contract phraseology employed in 1928, as it is at the present time, for the conveyance and transfer of "dialogue" or "talking" rights, and such phraseology appears specifically in ground I of appellee's motion for summary judgment and is conspicuously absent from the contract in question.

If there was such uncertainty, ambiguity and doubt as to the meaning and intention of the parties with respect to the grant of "dialogue" or "talking" rights as to require the "coverage" (to quote from appellants' correspondence) in Exhibits B, C and D attached to appellee's moving papers, certainly appellee is in no position at this time to contend that there was no ambiguity, doubt or uncertainty with respect to the construction of the contract.

It is undisputed and affirmatively appears from the joint affidavits submitted by appellants in opposition to the mo-

tion, that the contract marked Exhibit "A" (attached to the amended complaint) was prepared by the *appellee*. Any ambiguity or uncertainty in connection with this contract must therefore be construed against the appellee who prepared it.

*Phoenix Ins. Co. v. Slaughter*, 12 Wall. 404;  
*Noonan v. Bradley*, 9 Wall. 394;  
*Bighur v. Eclipse*, 237 Fed. 89;  
*Caldwell v. Twin Falls etc. Co.*, 225 Fed. 584;  
*Christian v. First Natl. Bank*, 155 Fed. 705;  
*Van Zandt v. Hanover Natl. Bank*, 149 Fed. 127;  
*Simon v. Etgen*, 213 N. Y. 589;  
*Moran v. Standard Oil Co.*, 211 N. Y. 187;  
*Gillett v. Bank of America*, 160 N. Y. 549.

The case does not depend, however, upon whether or not the contract appears to be clear and certain upon its face as to the grant of "talking" rights. Affidavits submitted in opposition to the motion for summary judgment abundantly support the allegations contained in appellants' complaint that at the time said agreement was entered into [par. IV, Tr. pp. 7-9] "there were in existence and generally known to and throughout the motion picture trade and industry three distinct separate sets and classifications of literary and dramatic rights which were at said time and place the subject of barter, purchase and sale throughout said trade and industry, as follows, to-wit:

(1) "*Motion Picture Rights*", to-wit: The rights to use literary or dramatic compositions in motion pictures.

(2) "*Sound rights*", to-wit: The right to utilize sound effects in conjunction with the use of literary or dramatic compositions in motion pictures.

(3) “*Dialogue rights*” and “*talking rights*”, to-wit: The right to use speech and dialogue in connection with literary or dramatic compositions produced in the form of “talking” motion pictures.

Appellants furthermore expressly alleged [Complaint, par. IV, Tr. pp. 7-8] that on the day said contract was entered into with appellee’s predecessor in interest there was a

“general, uniform, well-recognized, trade custom and trade usage in the motion picture industry to purchase and/or sell the particular class or classification of motion picture rights so desired to be purchased or sold and in said motion picture trade and industry at said time and place there was a general trade usage and custom that . . . the sale, license or grant of ‘motion picture rights’ together with rights to use ‘sound’ in conjunction therewith did *not* include ‘dialogue’ and ‘talking rights’, unless expressly provided, enumerated and granted at the time of sale and said general trade usage and custom were at said time and place well known throughout the motion picture industry.”

Appellants furthermore expressly alleged [Complaint, par. IV, Tr. p. 8]:

“Said agreement hereinabove referred to was made and entered into by each of the parties thereto with full knowledge of said trade customs and trade usages and with the intention that the same should apply to said agreement; and none of the parties hereto intended in and by said agreement aforesaid that ‘dialogue’ or ‘talking’ rights should be or were included in the grant, license and sale more particularly referred to in said agreement.”



We do not wish to take up the time of the court in quoting at length from the joint affidavits of Ralph Murphy and Donald Gallaher [Tr. p. 25], the supplemental affidavit of Donald Gallaher [Tr. p. 30]; the supplemental affidavit of Ralph Murphy [Tr. p. 35]; and the supplemental affidavit of Harold A. Fendler. [Tr. p. 77.] We do call particular attention, however, to the books written by well known authors referred to in the last affidavit hereinabove mentioned, all of which clearly distinguish between “sound” and “dialogue” and which refer to the combination of “sound” and “dialogue” as an “*innovation*” in the *fall* of 1928. [Tr. pp. 78-80.]

Granting that appellee’s answers and affidavits deny existence of the trade custom and trade usage pleaded, and deny knowledge of the contracting parties as to the existence thereof and deny the intention of the contracting parties to enter into the contract dated April 30, 1928, with respect to the trade custom and trade usage pleaded in the complaint, we nevertheless submit that affidavits in opposition submitted by appellants present strongly conflicting views and contentions which are abundantly supported by written text books and histories of the development of “sound” and “dialogue” in motion pictures.

In view of this conflict we respectfully submit in the words of Justice Cardoza while sitting on the Court of Appeals of the state of New York that the issue is “genuine, not feigned” (*Curry v. McKensie*, 239 N. Y. 267), and that this is not a case where there is “nothing in truth to be tried.” (*Curry v. McKensie, idem.*)

In *Norwich v. Barrett*, 200 N. Y. S. 298, it was said:

“The power of the Court upon application for summary judgment should be exercised with care and not extended beyond its just limits.”



If the case be doubtful it must go to trial.

*Massee etc. v. Benenson*, 23 Fed. (2d) 107;

*Mutual Life Ins. Co. of N. Y. v. Patterson*, 17  
Fed. Sup. 416;

The purpose of a summary judgment is to ascertain whether there is any tryable issue of fact; not to pre-try the case upon affidavits.

22 *American Bar Assn. Journal*, 881, at page 884:

“The effect of the rule is to enable the Court to find in advance that there is no issue of fact which necessitates a trial.”

*Norwood v. McCarthy* (Mass.), 4 N. E. Rep. (2d)  
450:

“A substitution of trial-by-affidavits for trial-on-evidence clearly is not intended. The duty of the trial judge is to determine whether there is a substantial issue of fact and not to try such issue if found to exist.” (Citing: *Maryland Cas. Co. v. Sparks*, 76 Fed. (2d) 929, at 933, and other cases.)

As is stated in *Moore Fed. Practice*, Vol. 3, page 3184:

“The court is not authorized to try the issue (of fact) but is to determine whether there is an issue to be tried. \* \* \* Summary judgment procedure should not be perverted to the trial of disputed questions of fact upon affidavits.”

## POINT V.

### In Any Event a Summary Judgment Is Improper in an Action for Infringement of Copyright.

#### ASSIGNMENTS OF ERROR I AND II.

##### I.

“The Court erred in determining that appellants are not entitled to the relief prayed for in their amended complaint.”

##### II.

“The Court erred in determining that the appellants are not entitled to relief upon the first cause of action alleged in their amended complaint.”

The first cause of action contained in appellants' amended complaint alleged infringement of copyright by appellee in connection with the dramatic composition entitled “The Nightmare,” copyrighted by appellants on December 9, 1927, under Class D, number 82003, copy of which was filed with the trial court. [Amended Complaint, pars. V, VI, VII, Tr. pp. 3, 4 and 5.]

In its answer appellee denied infringement. [Answer, par. VII, Tr. p. 45.]

It is well settled that infringement of patent or copyright cannot be determined upon motion for summary judgment under Rule 56 of the Rules of Civil Procedure.

In *Charles Blum Adv. Corp. v. L. & C. Mayers*, 25 Fed. Supp. 934, the Court denied a motion for summary judgment, stating:

“The present motion cannot be allowed for the reason that infringement is a fact to be found under

all the evidence which may be introduced at the trial. We cannot make the fact finding now.”

In *Bourner v. United States*, 26 Fed. Supp. 769 (E. D. N. Y.), the Court stated the same rule:

“If there is an issue of fact to be tried a motion for summary judgment cannot be granted. \* \* \* The facts in this case are in dispute. Therefore the case cannot be tried upon affidavits as that would be the result if a motion were granted for summary judgment. These issues of fact must await the trial of the case. Motion for summary judgment is denied.”

### Conclusion.

The Court, in granting a summary judgment on affidavits conflicting in many material points, has denied to appellants due process of law in failing to give appellants a trial in open court on the merits of the issues properly pleaded.

Rules 43 and 77 both provide that at the trial the testimony of witnesses shall be given in open court. To substitute trial-by-affidavit for trial in open court is violation of the Rules and of appellants' fundamental right to have their day in court.

Appellants have not had their day in court. They have properly pleaded as ultimate facts both the existence of a trade custom and trade usage, and that the same was in the contemplation of all parties when they made their con-

tract. Appellants supported these allegations by affidavits which on the motion for summary judgment must be taken as true unless clearly contradictory to other allegations in appellants' pleadings or affidavits.

The primary question in the case is one of fact as to the existence and inclusion in the contract of the trade custom and trade usage alleged in the plaintiffs' complaint. This question of fact can only be determined upon a trial.

The summary judgment should be reversed and the case remanded for a proper trial of the issues.

Respectfully submitted,

ROGER MARCHETTI and

HAROLD A. FENDLER,

*Attorneys for Appellants,*

1111 Pershing Square Building,  
Los Angeles, California.